

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

TERRI PAIGE RILEY

PLAINTIFF

v.

CIVIL ACTION NO. 3:09cv674 HTW-LRA

**BLUE CROSS & BLUE SHIELD OF MISSISSIPPI
AND THE ELECTRIC POWER ASSOCIATION
OF MISSISSIPPI GROUP BENEFITS TRUST**

DEFENDANTS

**PLAINTIFF'S RESPONSE TO BLUE CROSS BLUE SHIELD OF MISSISSIPPI'S
MOTION FOR SUMMARY JUDGMENT**

COMES NOW, the Plaintiff, Terry Page Riley, and files this her Response to Blue Cross Blue Shield of Mississippi's Motion for Summary Judgment, and request that the Court enter an order denying the Motion for Summary Judgment filed by Blue Cross Blue Shield of Mississippi, and would show unto the Court the following:

1. The Plaintiff suffers from gastroparesis and on or about August 15, 2005, the Plaintiff underwent implantation of gastric electric stimulation ("GES"), also known as Enterra Therapy, to treat her gastroparesis. BCBS I.D. No. BC 00214 - BC 00218.¹ On or about December 10, 2007, the battery on the GES device expired and the Plaintiff underwent additional surgery to replace the battery. BCBS I.D. No. BC 00694 - BC 00696.

2. In the spring of 2009, the battery on the GES device expired again and another procedure was needed to replace the battery. BCBS I.D. No. BC 00617. The Plaintiff's surgeon, Dr. Terrence Jackson, attempted to obtain prior authorization for the replacement of the battery.

¹ BCBS I.D. stands for BlueCross BlueShield of Mississippi's Initial Disclosures. Plaintiff has attached these documents as cumulative Exhibit "A".

BCBS I.D. No. 674.

3. On or about June 3, 2009, the Defendant, Blue Cross Blue Shield of Mississippi (“BCBS”) sent the plaintiff a letter stating that the prior authorization review was not available. The Plaintiff contacted the Plan directly asking the Plan to direct BCBS to conduct a prior authorization review.

4. On or about July 16, 2009, the Plaintiff received a letter from BCBS stating that the procedure to replace the battery for the GES was denied. BCBS stated as a basis for their denial that GES was considered investigational for the treatment of gastroparesis. BCBS I.D. No. BC 00477 - BC 00478.

5. The July 16, 2009, letter from BCBS failed to recite the Plaintiff’s appeal rights, therefore not providing the Plaintiff with a full and fair review. The Plaintiff filed her appeal with BCBS on or about July 22, 2009. BCBS I.D. No. BC 00167 - BC 00176.

6. On or about July 31, 2009, the Plaintiff had the battery replaced because her doctor advised her that she could no longer delay the procedure. BCBS I.D. No. BC 00505 - BC 00559.

7. On or about September 8, 2009, the Plaintiff received and Explanation of Benefits (“EOB”) stating that BCBS needed “medical necessity documentation.” BCBS I.D. No. BC 00476. The Plaintiff directed BCBS to the July 22, 2009, appeal, which contained voluminous medical necessity documentation. On or about September 30, 2009, the Plaintiff received an EOB stating that the claim was denied because service was “not medically necessary.” BCBS I.D. No. BC 00473. The Plaintiff again referred BCBS to the July 22, 2009 appeal, which remained pending, and to which no response has ever been received.

8. On or about November 10, 2009, the Plaintiff filed her complaint against BCBS and the Plan.

9. BCBS of MS has not provided full and fair review by failing to recite Ms. Riley's rights to appeal. ERISA requires "full and fair review" by ERISA plan administrators under 29 U.S.C. § 1133.

10. The core requirements of a full and fair review include 'knowing what evidence the decision-maker relied upon, having an opportunity to address the accuracy and reliability of that evidence, and having the decision-maker consider the evidence presented by both parties prior to reaching and rendering his decision.

11. BCBS is further liable for misrepresentations made to the Plaintiff, as well as, third parties acting on the Plaintiff's behalf, further breaching their fiduciary duty.

12. Summary judgment is inappropriate if the record shows that the plan's evaluation of the claim was so procedurally flawed that the Plaintiff did not receive a full and fair review.

13. BCBS did not perform the necessary duties bestowed upon it as administrator, and as a result, the Plaintiff suffered severe pain and anguish.

WHEREFORE, PREMISES CONSIDERED, Plaintiff, Terri Paige Riley, most respectfully requests that this Honorable Court deny Defendant's, Blue Cross Blue Shield of Mississippi, Motion for Summary Judgment, and grant unto Plaintiff such other relief as this Court deems justified.

Respectfully submitted,
TERRI PAIGE RILEY

By: /s/ Grady L. "Mac" McCool, III
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CERTIFICATE OF SERVICE

I, Grady L. "Mac" McCool, III, certify that I caused the be electronically filed the foregoing with the Clerk of the Court using the ECF system which is to send notification of such filing to counsel:

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This the 20th day of April, 2010.

/s/ Grady L. "Mac" McCool, III
GRADY L. "MAC" McCOOL, III